In The

Supreme Court of the United States

October Term, 1977

No. 77- 77-53

MARIE PIERRE, *et al.*,

Petitioners,

–against–

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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Marie Pierre and 146 Haitian nationals[1] petition for a writ of *certiorari* to review the judgment of the United States Court of Appeals for the Fifth Circuit affirming the district court's order dismissing the petition for writ of *habeas corpus*.

Opinions Below

The opinion of the court of appeals (App. A, 1a – 25a) is reported at 547 F.2d 1281. The opinion of the district court (App. C, 27a – 31a) is not reported.

1. The names of the petitioners are listed in Appendix F, *post*, at pages 38a – 39a. References herein to "a" are to pages in the appendix portion of the petition.

Jurisdiction

The judgment of the court of appeals (App. B, 26a) was entered on March 7, 1977. A timely petition for rehearing was denied on April 12, 1977. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

Constitutional, Statutory, and Treaty Provisions Involved

The following provisions, the relevant texts of which are set forth in Appendix E to the Petition (*post* at 33a – 37a), are involved: The Fifth Amendment to the Constitution of the United States; the United Nations Convention and Protocol Relating to the Status of Refugees (19 U.S.T. 6223), Articles 1, 33; the Immigration and Nationality Act, 8 U.S.C. §1101, *et seq.*, sections 235 and 236, 8 U.S.C. §§1225, 1226.

Questions Presented

1. Whether Article 33 of the United Nations Protocol Relating to the Status of Refugees creates a right on behalf of an excludable alien who has presented himself at the frontiers of the United States and who is a "refugee," as that term is defined in Article I of the Protocol, not to be returned to a state in which such refugee's "life or freedom would be threatened on account of his . . . membership of a particular social group or political opinion"?

2. Whether an otherwise excludable alien who presents himself at the frontiers of the United States and requests political asylum has the right, pursuant to the Protocol and the Immigration Act, to show an immigration judge at an exclusion hearing that he in fact is a *bona fide* refugee within the meaning of Article 1 and therefore is entitled to the protection of Article 33?

3. Whether petitioners were denied the right, in violation of the Protocol, the Administrative Procedure Act, and the Fifth Amendment, to a fair hearing at which they could show an impartial hearing officer that they were in fact *bona fide* refugees within the meaning of Article 1 and therefore entitled to the protection of Article 33?

4. Whether the court of appeals was correct in holding that the United States is free to act in a completely arbitrary manner, unrestricted even by the procedural due process limitations of the Constitution of the United States, with respect to the life and liberty of aliens physically present in the United States?

Statement

This case – one of first impression – involves applications for political asylum by petitioners, Haitian nationals who covertly fled their country on small boats during 1972 and 1973 and sought protection as political refugees against return to Haiti (27a). At issue is the meaning and application of Articles 1 and 33 of the United Nations Protocol and Convention Relating to the Status of Refugees, a treaty to which the United States acceded in 1968. 19 U.S.T. 6223, T.I.A.S. 6557.

1. Petitioners arrived in the United States near Miami and immediately sought out or were met by immigration enforcement officers, who took them into custody and interviewed them to determine their status (27a). The interviews purportedly were for the purpose of determining whether petitioners possessed visas or other travel documents, but in fact they were to be the only proceeding at which petitioners would be allowed to present their requests for political asylum.

The nature of the interviews is not in dispute.[2] They typically took place as soon as the petitioners were taken into cus-

2. The interviews were not transcribed, and the district court declined to hear evidence as to their nature. Petitioners' contentions as to the nature of the interviews, however, were not disputed and in many instances were acknowledged by the government, both at petitioners' exclusion hearings and at oral argument before the district court. Accordingly, the district court issued limited findings of fact, to which we refer where appropriate. In addition, we shall refer to pages in the Record of Exclusion Proceedings ("E.P.") or in the Petitioners-Appellants Appendix in the court of appeals ("A.A."), both of which remain on file with the court of appeals. Copies will be lodged with the Court upon request.

tody, even in the middle of the night (E.P. at 405). Each interview lasted an average of about twenty minutes, including the time taken for translation and securing biographical information. (See, *e.g.*, E.P. at 405, *et seq.*). No attorneys were allowed to assist the petitioners, despite the fact, known to the Miami District Director of INS, that attorneys were available and willing to do so (A.A. at 62a). The INS officers did not describe to petitioners the standards which must be met in order to qualify for political asylum. Petitionere were not afforded an opportunity to introduce evidence or to call witnesses, nor were they informed of the existence of evidence adverse to their claims or given an opportunity to rebut or respond to such evidence (A.A. at 62a). No formal records of the interviews were made. Many petitioners were illiterate even in their own language; few, if any, spoke English. In short, the interviews in no way provided a meaningful factual inquiry into the question of whether or not petitioners were *bona fide* political refugees.[3]

The District Director transmitted summaries of the interviews to the Office of Refugee and Migration Affairs of the Department of State (ORM) (28a) for the purpose of obtaining the Department's views on the applications for refugee status. Petitioners were not informed of the fact or contents of the communications to ORM. ORM replied to the District Director, usually within a day or two, that refugee status should not be granted. Petitioners were not informed of the contents of ORM's communications with the District Director, nor were they given an opportunity to respond to, explain, or rebut any statements or inferences in such communications. Upon receiving the views of ORM, the District Director denied the applications for asylum,

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3. The summary interview procedures were studied by the Subcommittee on Immigration, Citizenship, and International Law of the House of Representatives Committee on the Judiciary. *Haitian Emigration* (Committee Print) (July 1976). The subcommittee found that the interview procedure was a serious obstacle to effective presentation of an asylum claim, noting that the applicants appeared nervous and fearful, and did not fully comprehend the nature and meaning of asylum or the purpose of the interview. See Report at 3, 5, 7.

without a statement of reasons.[4]

Subsequently exclusion hearings were held before immigration judges to determine whether petitionere should be excluded from entering the United States, pursuant to Section 212(a)(20) of the Immigration and Nationality Act, 8 U.S.C. §1182(a)(20) (28a).[5] In each case the immigration judge refused to hear evidence or argument on the petitioners' status as political refugees (*id.*). The only issue determined at the exclusion proceedings was whether petitioners were excludable within the meaning of the statute, that is, whether they were in possession of visas or other entry documents upon arrival and whether they had effected an entry (*id.*). In each case, the immigration judge found the petitioner to be excludable. Appeals to the Board of Immigration Appeals were dismissed (*id.*).

2. Petitioners filed for a writ of *habeas corpus* in the United States District Court for the Southern District of Florida. They argued that the Protocol, a treaty duly ratified by the Senate and acceded to by the United States in 1968, created a liberty

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4. The District Director's reliance on the ORM "recommendations" was most severely criticized by the House of Representatives Immigration Subcommittee:

> Finally, a review of a number of reports which have been submitted by ORM to INS' District Office in Miami revealed that in most instances ORM reports were grossly inadequate in that they fail to respond to the specific allegations contained in the asylum request. In general, they constituted arbitrary denials, based apparently on the socioeconomic status of the applicant.

Haitian Emigration, supra n. 3, at 8.

5. United States immigration law distinguishes between aliens subject to exclusion proceedings and aliens subject to deportation proceedings. An alien who has effected an "entry" into the United States is entitled to a deportation hearing. An entry may be made either lawfully (by inspection and admission by an immigration officer) or unlawfully (by actual and intentional evasion of inspection by an immigration officer coupled with freedom from restraint within the physical territory of the United States, even for a short period of time). See *Matter of Pierre*, B.I.A. Interim Decision No. 2238, slip op. at 4-5. Aliens who have not made such an entry are subject to exclusion proceedings.

right on behalf of a *bona fide* political refugee, as defined by Article 1 of the Protocol, not to be returned to a country of persecution. Accordingly, petitioners urged that, pursuant to sections 235 and 236 of the Immigration and Nationality Act, 8 U.S.C. §§1225 and 1226, they were entitled to show that they qualified for the benefits of that right in the course of their exclusion hearings. Alternatively, petitioners argued that they were entitled to a full and fair evidentiary hearing before an impartial decision-maker pursuant to the Protocol, the Administrative Procedure Act, and the due process clause of the Fifth Amendment.

The district court dismissed the petition. In a brief opinion, it held that the procedures followed by INS "were largely immune from judicial control" (29a) and that there was "no capricious or arbitrary action . . . that would warrant intervention by the United States District Court" (30a).

There then followed a series of complicated procedural actions, which are set forth in the court of appeals' opinion (12a–16a) but which are not of importance here.[6] The case finally came before the court of appeals and was decided by it in the posture described above.

3. The court of appeals affirmed the district court's order dismissing the action. It held that the Protocol did not create new substantive or procedural rights for aliens physically present in the United States seeking protection against return to a country in which their lives or freedom would be threatened for political or social reasons. In reaching its conclusion, the court of appeals relied exclusively upon statements in the legislative history to the effect that the Protocol would not require the United States "to admit new categories or numbers of aliens"

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6. The case was appealed to the court of appeals, which remanded to the district court (A.A. 82a). The district court remanded to INS (A.A. 83a), issued a series of clarifying orders (A.A. 84a, 100a), and ultimately "returned" the case to the court of appeals on the basis of its original decision (A.A. 112a – 115a, 119a; App. D, *post* at 32a). Neither INS nor the district court took any further action with respect to petitioners during the course of these further proceedings.

(18a), and that the Attorney General would be able to administer Articles 32 and 33 of the Protocol "without amendment of the [Immigration and Nationality] Act" (17a). It thus concluded that "the Protocol left intact the INS procedure for determining refugee status, and that procedure was followed in this case without abuse of discretion" (22a).

The court of appeals also held that since petitioners were excludable aliens who had not formally entered the United States, the government was free to act toward them without any constitutional limitation whatever. Accordingly, the court rejected petitioners' claim that they were entitled to due process of law in the consideration of their applications for asylum (22a – 25a).

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Reasons for Granting the Writ

This case presents the Court with a crucial opportunity to clarify the meaning and scope of the Protocol Relating to the Status of Refugees, a treaty ratified by the Senate and acceded to by the President to assure that this nation will not cooperate with attempts by foreign regimes to suppress human rights and freedoms. The opinion of the court of appeals renders the Protocol a nullity as far as providing legal assurance against bureaucratic actions which would return political or social dissidents or minorities to regimes which would persecute them for those reasons. As we show *post*, the court of appeals' holding is contrary to interpretations of the Protocol made by other federal courts, by the Board of Immigration Appeals, and by senior officials of the Immigration and Nationality Service, the State Department, and even the Justice Department. The construction of such an important international treaty, the application of which will affect – perhaps definitively – the lives and freedom of many individuals subject to the jurisdiction of the United States, should not be left in the confused and contradictory state in which it presently rests as a result of the opinion of the court of appeals.

It is especially necessary that the Court confront the task of interpretation now rather than later because of the human

exigency of the case. This is potentially a capital case.[7] Petitioners seek protection against return to a country in which political repression, torture of political prisoners, and summary executions and brutality are the usual practice.[8] They fear that they will be subject to that fate if the orders of exclusion and deportation are carried out. Their applications for political asylum were denied pursuant to administrative procedures which can give this Court no assurance that their fears are groundless.[9]

Contrary to the overblown fears of the court of appeals (19a), petitioners do not seek to litigate the merits of their claims to be *bona fide* refugees in the federal courts. All they seek is an order requiring the government to provide them with a full and fair opportunity to prove that, in the words of the Protocol, their fears are "well-founded." Given the limited nature of the relief sought, the faulty premises and analysis of the court of appeals' opinion, and the extraordinary consequences of improper denials of political refugee status, *certiorari* should be granted to determine the novel questions presented by this case.

1. In holding that "no new rights or entitlements were vested in these petitioners by operation of the Protocol" (19a),

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7. At stake ultimately are the lives and freedom not only of the petitioners herein, but also those of several hundred other Haitians whose cases are similar. *Cf., e.g., Sannon* v. *United States*, 427 F. Supp. 1270 (S.D. Fla. 1970), involving about 300 Haitian asylum applicants.

8. That this is true is confirmed by the most recent study of the human rights situation in Haiti by Amnesty International, an impartial observer of the treatment of political prisoners around the world. Amnesty's fairness and accuracy have been recognized by the State Department. Excerpts from the latest Amnesty International Report on Haiti are reproduced in Appendix G hereto (*post* at 40a – 43a).

9. Many of these petitioners, as well as hundreds of other similar situated Haitians, have sworn to accounts of arbitrary arrests, of torture, of detention without trial, and of summary executions. The accounts are so hair-raising that they are difficult to believe, until corroborated time after time by new arrivals seeking asylum, by testimony of the few ex-political prisoners who have escaped or been released, and by independent observation of groups such as Amnesty International (See n. 8, *supra;* Appendix G, *post*).

the court of appeals totally ignored the plain meaning of Article 33 of the Protocol. *Cf., Caminetti* v. *United States,* 242 U.S. 470, 485. The language of the Article is unambiguous and mandatory:

> No contracting state shall expel or return ("refouler") a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.

By the terms of Article 33, the United States is precluded from returning *bona fide* refugees to the country in which they would be persecuted. No exception is made for refugees not "lawfully" within the United States or for refugees who have not effected a formal "entry." The Protocol is a restriction upon the actions which the United States may take with respect to any *bona fide* refugee subject to its jurisdiction.[10]

In the face of the clear words of Article 33, the court of appeals drew support for its conclusion solely from several isolated and ambiguous statements in the legislative history by

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10. Article 33 is to be contrasted with Article 32, which provides that a contracting state shall not deport a refugee *lawfully* in its territory to any other country. Article 33 is not restricted to refugees lawfully within the territory of the contracting state, but applies to all refugees. Unlike Article 32, however, Article 33 does not act as an absolute bar to deportation to another country; it only assures that the refugee will not be returned to the state in which his life or freedom will be threatened. Under Article 33, a contracting state may deport a refugee to another state willing to accept him and which will not threaten his life or freedom. If deportation to such a country is not possible or practical, however, then the refugee must be allowed to remain in the country of refuge. See Grahl-Madsen, *The Status of Refugees in International Law* 223-224, 435, and *passim;* Robinson, *Convention Relating to the Status of Refugees – Its History, Contents, and Interpretation* 156-157 (1951); *Hearings on Indochina Refugees Before the Subcommittee on Immigration, Citizenship and International Law of the House of Representatives Committee on the Judiciary*, 94th Cong. 1st Sess. 37, 42-43 (1975); Memorandum for the United States in Opposition in *Kan Kam Lin* v. *Rinaldi*, No. 73-1710 (October Term 1974), pp. 5-6.

Senator Sparkman and Lawrence Dawson, the then-Acting Deputy Director of the Office of Refugee and Migration Affairs of the State Department. The court of appeals' reliance on these statements not only is unjustified, but reflects the court's failure to analyze the context and structure of the Immigration Act at the time of ratification or at the present time.

In his testimony before the Senate Foreign Relations Committee, Deputy Director Dawson assured the Committee that accession to the Protocol would not require the United States to amend the Immigration Act or to admit new categories or numbers of aliens (17a-18a). These assurances were entirely consistent with the scope and force of the right created by the words of Article 33. Article 33 in no way requires the United States to "admit" new categories of aliens into the United States. It has nothing to do with immigrant status, immigration quotas, or labor certification requirements.[11] Rather, as Dawson made clear, Article 33 establishes "the asylum concept . . . against the *return* of a refugee" to a persecuting country (17a) (emphasis added). As already noted (n. 10, *ante*), Article 33 does not require that a refugee even be permitted to remain in the United States. While it may be that in some, or even most, instances the United States will not wish to effect deportation of a *bona fide* refugee to another non-persecuting country, such refugee will remain in the United States on only a temporary basis, and as a non-immigrant.[12] The number of immigrants admitted into the United States would not be affected, and no change in the Immigration Act would be necessary to accommodate such refugee.

At the time that the Protocol was ratified, there was no

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11. A different panel of the court of appeals recognized this point on a collateral issue in this very case, in holding that petitioners – being non-immigrants – are not bound by the labor certification requirements of the Immigration Act. *Pierre* v. *United States*, 525 F.2d 933, 935 (5th Cir. 1976).

12. Congress, of course, could *choose* to amend the Immigration Act so that such a refugee may regularize his status. A bill authorizing regularization of status in some instances is pending in the House of Representatives, and has received the endorsement of the Justice Department. See H.R. No. 3056, 95th Congress, 1st Session.

general asylum provision in the Immigration Act with as broad a scope as Article 33. Section 243(h) of the Act, 8 U.S.C. §1253(h), authorized the Attorney General to withhold *deportation* of a political refugee, but no similar protection was afforded an alien seeking asylum who arrived at the frontiers of the United States and thus was subject to *exclusion* proceedings.[13] To be sure, it was the announced *policy and practice* of the United States to afford asylum to all excludable *bona fide* refugees who arrived at its frontiers but that policy and practice was not reflected in law and therefore was not binding upon the government. See *Matter of Dunar, supra.* The effect of the Protocol, therefore, was to make mandatory upon the United States implementation of its previous practice and policy of extending asylum to excludable alien refugees physically present in the United States. This effected no "radical change" in the immigration laws of the United States; it did, however, create a new legal right against forced return to a country of persecution where no such legal right had existed previously.

The court of appeals holding to the contrary, that no new substantive right was created for excludable refugees, is not shared by other courts, executive officers, scholars, and the international community. In a recent decision involving about 300 Haitians similarly situated to the petitioners in this case, Judge James L. King of the United States District Court for the Southern District of Florida recognized the clear and explicit right to asylum created by Article 33. *Sannon* v. *United States,* 427 F. Supp. 1270 (1977). The Board of Immigration Appeals in the *Dunar* case, *supra,* similarly has held that Article 33 creates an absolute right of *non-refoulement* and "leaves no room for the exercise of discretion." Slip op. at 14. Former INS Commissioner Chapman recently testified before Congress on the effect of Article 33 and explained that:

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13. In addition, section 243(h) was couched in discretionary terms while Article 33 is mandatory, but the Board of Immigration Appeals has held that section 243(h) affords very limited, if any, discretion to the Attorney General to refuse to withhold deportation of a *bona fide* refugee. *Matter of Dunar,* Board of Immigration Appeals Interim Decision No. 2192 (1973).

> Any person setting foot on United States soil, under the terms of the Asylum protocol, is entitled to apply for asylum. He cannot be returned forcibly to his country of origin, so they are here.

Hearings on Indochina Refugees, supra n. 10, at 34. See also *id.* at 29, 30, 42-43, 48, 74, 79.

At the same proceeding, the State Department's legal representative explained, with respect to a hypothetical Indochinese refugee who arrives at United States frontiers, that:

> We are barred from returning him to the territory where he has a well-founded fear of being persecuted because of political opinion or otherwise.
>
> * * *
>
> He could be sent through the deportation or exclusion process to another country which is willing to accept him. If such a third country could not be located, we would presumably have the individual in a kind of indefinite status, subject to exclusion as soon as a proper location could be found, or until his fear of persecution was found to be unwarranted.

Id. at 37. Similar interpretations of the effect and scope of Article 33 have been made elsewhere by the State Department,[14] the Solicitor General,[15] the leading scholars who have analyzed the Protocol,[16] and the United Nations High Commission for

14. See *United States Policy Guideline for Asylum Requests*, 66 Dept. of State Bull. 609 (1972); Hearings Before the Subcommittee on International Organizations of the House of Representatives Committee on International Relations, *Human Rights in Haiti* 4 (1975) (Comments of Deputy Assistant Secretary of State William Luers).

15. Brief of the United States in Opposition in *Kan Kam Lin* v. *Rinaldi*, *supra* n. 10, pp. 5-6.

16. Grahl-Madsen, *The Status of Refugees in International Law* 223-224, 435; Weis, *The United Nations Declaration or Territorial Asylum*, Canadian Yearbook of International Law 92, 124 (1969); Robinson, *Convention Relating to the Status of Refugees – Its History, Contents and Interpretation* 156-157 (1951).

Refugees.[17] The court of appeals is alone in its interpretation of Article 33, and it can find no support whatever for its view.

2. If Article 33 indeed creates a right on behalf of a *bona fide* political refugee not to be returned to a country of persecution, the critical question then becomes factual: whether an alien is a *bona fide* refugee, as defined in Article 1. Clearly some kind of "hearing" is required to make such a determination. Petitioners submit that, at the least, the summary interview procedures followed in this case were legally insufficient, and that an evidentiary hearing was required (1) by statute, pursuant either to the Immigration and Nationality Act or the Administrative Procedure Act, and (2) as a matter of constitutional due process.

The court of appeals rejected petitioners' argument, concluding that Congress was aware of and approved summary procedures of the type followed in this case, and that Congress' decision could not be challenged on constitutional grounds. The court again relied upon the comments of Lawrence Dawson of the State Department to the Senate Foreign Relations Committee that the Immigration Act prior to the Protocol was in major part consistent with the Protocol, and that therefore "the Attorney General will be able to administer [Articles 32 and 33] in conformity with the Protocol without amendment of the Act" (17a). Neither Dawson nor any other official made the slightest suggestion, however, that in administering the Protocol the Attorney General would or could utilize summary interview procedures rather than a fair hearing. Nevertheless, the panel, relying upon the fact that prior to accession to the Protocol excludable aliens were not entitled by statute or regulation to an evidentiary hearing on asylum applications, held that Congress approved the summary non-hearing procedures utilized here:

> Because the Protocol contained no procedures for making this determination, and because Congress saw fit at

17. See, *e.g.*, *Report of the United Nations High Commissioner for Refugees*, General Assembly, 29th Session, Supplement No. 12(A/9612) (Oct. 17, 1974), pp. 3, 5-7; *Addendum to the Report*, Supplement No. 12A (A/9612/Add.1); *Addendum to the Report of the United Nations High Commissioner for Refugees*, General Assembly, 30th Session, Supplement No. 12A (A/10012/Add.1) (Oct. 1975).

> the time of accession to leave *existing procedures* unchanged, we conclude that it was the intent of Congress that *existing procedures* be followed. *These procedures* were followed with respect to petitioners' application for refugee status in this case.

20a – 21a (emphasis added).

There is absolutely no warrant to the court of appeals' view. In the first place, the so-called "existing procedures" followed in the instant case, which the court of appeals held Congress approved, were not even authorized until 1972 when the Operations Instructions directing interviews of asylum applicants first were issued. See Gordon & Rosenfeld, *Immigration Law and Procedure* §2.3i, pp. 2-242 (1976); 49 Interpreter Releases No. 44 (Nov. 17, 1972).[18] Thus it would have been impossible for Congress in 1968 to have intended that such procedures be used to administer Article 33.

An examination of immigration law and practice in 1968 reveals that there were indeed existing fair procedures which were available to administer Article 33, and that Congress intended that they be utilized. We refer to the statutory provisions for deportation and exclusion hearings. 8 U.S.C. §§1251, 1252 and 8 U.S.C. §§1225, 1226.

It will be recalled (*ante* at 11) that prior to accession to the Protocol, section 243(h) of the Immigration Act specifically authorized the Attorney General to withhold deportation, but not exclusion, of *bona fide* refugees. 8 U.S.C. §1253(h). Implementation of section 243(h) was effected by permitting the

18. The Operation Instructions are set forth in the court of appeals opinion (8a – 9a). The court of appeals assumed, without analysis, that the Operations Instructions authorized the summary procedures followed in this case, *i.e.*, that the District Director complied with the Instructions. Petitioners note that even the Operations Instructions required that the District Director give each petitioner "an opportunity to fully present his case" with "detailed facts"; the summary interviews provided here in no meaningful way complied with that mandate. The court of appeals failed to address petitioners' argument on this point.

deportable asylum seeker to raise the issue before an immigration judge in the course of a deportation hearing. 8 C.F.R. §242.8. An excludable alien could not raise his claim to be a refugee in the course of an exclusion hearing because an excludable alien had no legal right to asylum. The "policy and practice" of the United States to extend asylum to excludable refugees was administered informally, without statutory or regulatory mandated procedures.[19]

Article 33 of the Protocol equalized the *legal right* of excludable and deportable refugees not to be returned to a country in which they would be persecuted. One question which obviously concerned the Senate was the procedural method for implementing Article 33. In a statement to the President and to Congress in support of the Protocol, Secretary of State Rusk explained that Article 33 "is comparable [not identical] to section 243(h) . . . and it can be implemented within the administrative discretion provided by existing regulation." Senate Exec. K, 90th Cong. 2d Sess. at VIII. Existing regulation delegated to the Commissioner of INS authority "to issue regulations as deemed necessary or appropriate for the exercise of any authority delegated to him by the Attorney General . . ." 8 C.F.R. §2.1. Section 103 of the Act gave the Attorney General power "to establish such regulations . . . as he deems necessary for carrying out his authority. . . ," which included "administration and enforcement of this chapter and all other laws relating to the immigration . . . of aliens." 8 U.S.C. §1103.

In short, the State Department assured Congress that it need not pass legislation to implement Article 33 because existing authority permitted use of procedures comparable to those which already existed implementing section 243(h).[20] Despite

19. Even then, however, it was the practice, as mandated by the district courts, to provide an excludable alien seeking asylum with a full and fair evidentiary hearing on his claim. See, *e.g.*, *Glavic* v. *Beechie*, 225 F. Supp. 24 (S.D. Tex. 1963), *aff'd.*, 340 F.2d 91 (5th Cir. 1964); *United States ex rel. Kordic* v. *Esperdy*, 274 F. Supp. 873 (S.D.N.Y. 1967); *Vucinic* v. *INS*, 243 F. Supp. 113 (D. Ore. 1965).

20. The most that was required was promulgation of a regulation that an excludable alien could raise his claim to asylum under the Protocol in the course of his exclusion hearing. This would have paralleled the existing regulation which permitted and permits a deportable alien to raise an asylum claim in the course of his deportation hearing. 8 C.F.R. §242.8.

this assurance, however, no formal procedures for determination of refugee status of excludable aliens were established at all until 1972, and then only the vague and inadequate procedures of the Operations Instructions were authorized (but not followed in this case). The failure of INS and the Attorney General to provide full and fair procedures can in no way be imputed to Congress.[21]

Indeed, as Judge King convincingly demonstrates in his *Sannon* opinion, the statutory scheme existing at the time of ratification of the Protocol, and existing today, requires that INS permit excludable aliens to prove that they are Article 1 refugees entitled to the protection of Article 33 in the course of their exclusion hearings. The court of appeals had the *Sannon* opinion before it, but chose to ignore it rather than answer it or accept it. Petitioners submit that the *Sannon* decision is indubitably correct and requires that *certiorari* be granted and the court of appeals decision reversed. This is especially true because the

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21. Indeed, it is difficult to believe that Congress would have approved the absurd distinction in the administration of Article 33 which presently exists:

> Consider two aliens who, fleeing their homeland, arrive at the United States. The first enters illegally and secrets himself in the community until he is finally caught. Because he "has" officially entered, he is deportable. The second alien chooses to surrender himself upon entry and is thereupon paroled into the country. According to the prevailing interpretations he is excludable.
>
> The Protocol does not differentiate between the rights these two aliens should have, and logically it is difficult to see why the excludable alien should be at any disadvantage. [Present procedures], however, render the excludable alien at a monumental procedural disadvantage in asserting rights under the Protocol . . .
>
> Since the Protocol grants the same rights to both of the hypothetical aliens, the resulting disparity in number and types of opportunities available for the establishment of these rights finds no justification in the Protocol, in logic or in fairness.

Sannon v. *United States, supra,* 427 F. Supp. at 1276 (footnotes omitted).

Sannon analysis makes it unnecessary to reach or decide the difficult and important constitutional issues posed by the panel's insupportable conclusion that Congress intended that determinations of refugee status be made in the summary, non-evidentiary manner in which they were made in this case. *Cf., Kent* v. *Dulles,* 357 U.S. 116.

3. Even if, however, petitioners did not have a right under the Immigration Act to raise their claims to be Article 1 refugees in the course of their exclusion hearings, they did have a due process constitutional right to a fair evidentiary hearing at which they could prove the validity of their claims.

The right not to be returned to a country in which one's life or freedom would be threatened is by definition a liberty right within the meaning of the Fifth Amendment. See *Fong Foo* v. *Shaughnessy,* 234 F.2d 715 (2d Cir. 1955); *United States ex rel. Mercer* v. *Esperdy,* 234 F. Supp. 611, 615 (S.D.N.Y. 1964); *cf., Ng Fung Ho* v. *White,* 259 U.S. 276, 284. The State Department itself emphasized the point in urging the Senate to ratify the Protocol. In his statement to the Committee on Foreign Relations, Deputy Director Dawson stated:

> The Protocol is a human rights document. The human rights which it covers for the refugees involved are of the most crucial and the most important type. They are literally the difference between life and death for many of them. They are in all cases the difference between the opportunity to live in dignity as a decent, self-supporting, selfrespecting human being, or else in the absence of such opportunity, to languish in camps or otherwise in a state of dependency.

Senate Executive Report No. 14, 90th Cong. 2nd Sess. (Sept. 30, 1968), p. 4. See also *Report of the United Nations High Commissioner on Refugees,* General Assembly, Twenty-Ninth Session, Supplement No. 12 (A/9612) (1974), pp. 5-6.

Denial of asylum to an alien claiming refugee status and forced return to the country from which the alien has fled con-

stitutes a truly "grievous loss"[22] in the most basic sense. And it matters not that the source of the claimed right against *refoulement* derives from a treaty, ratified by the United States Senate and having the force and effect of a statute. *Wolff* v. *McDonnell*, 418 U.S. 539, 557, 558. Accordingly, the government may not deprive petitioners of their liberty on the basis of a finding that they are not, in fact, Article I refugees unless such finding is made pursuant to procedures commensurate with the due process clause of the Fifth Amendment. See *Morrissey* v. *Brewer*, 408 U.S. 471; *Board of Regents* v. *Roth*, 408 U.S. 564; *Gagnon* v. *Scarpelli*, 411 U.S. 778; *Wolff* v. *McDonnell*, *supra*.

The court of appeals rejected petitioners' due process argument on two grounds. First, the court held that it does not matter whether or not Article 33 creates a liberty right because the District Director found that petitioners were not *bona fide* refugees, pursuant to procedures of which Congress purportedly was cognizant and which it intended to leave "intact" (20a). Even assuming that Congress intended the summary non-evidentiary procedures utilized here, however, the court of appeals analysis is circular and contrary to due process doctrine as applied by this Court.

The entire point of due process is to guard against inadequate fact-finding processes. The court of appeals cannot properly avoid analysis of whether a liberty right is at stake and whether the procedures followed were constitutionally sufficient merely by noting that petitioners were found not to be refugees pursuant to the very procedures whose adequacy is drawn into question.

The point the court of appeals rather inartfully attempted to draw was that Congress, in its view, conditioned the substantive rights created by Article 33 upon submission to the summary non-evidentiary procedures followed. But modern due process doctrine specifically rejects such an analysis. See *Arnett* v. *Kennedy*, 416 U.S. 134, 177-187 (Opinion of White, J.), 165-

22. *Morrissey* v. *Brewer*, 408 U.S. 471, 481; *Joint Anti-Fascist Refugee Comm. v. McGrath*, 341 U.S. 123, 168 (Frankfurter, J., concurring).

167 (Opinion of Powell, J.). The Court repeatedly has made clear that once a liberty right is created, even if by statute, its enjoyment cannot be conditioned upon constitutionally inadequate procedures. *Wolff* v. *McDonnell*, *supra*; *Gagnon* v. *Scarpelli* *supra*.[23]

The second ground on which the court of appeals attempted to justify its result was that "petitioners are not entitled to constitutional protections" (24a) because they are excludable aliens who have not effected a formal "entry" into the United States.

The implications of the court of appeals holding are appalling. If petitioners cannot invoke even the protections of procedural due process, there would be no bar to the government ordering their summary imprisonment, torture or execution for any or no reason and without trial or hearing of any kind. This never has been nor could be the law. While it may be true, as the court stated, that the protections of the United States Constitution "cannot be afforded to the entire population of the world" (24a), it also always has been true that in acting with respect to an alien physically present in the United States and over whom it has power to exercise its sovereignty, the United States must act within constitutional limitations. Thus in *Wong Wing* v. *United States*, 163 U.S. 228, the Court rejected the government's claim that it could criminally punish a deportable or excludable alien or deprive him of his property without affording him constitutional due process, including trial by jury. The court stated "all persons within the territory of the United States are entitled to the protection guaranteed by the [Fifth and Sixth] Amendments." 163 U.S. at 238.

Other decisions of the Court and of lower federal courts have been to the same effect.[24]

23. We already have noted the court of appeals' error in concluding that Congress intended such procedures.

24. See, *e.g.*, *Balzac* v. *People of Puerto Rico*, 258 U.S. 298, 312-313 ("The Constitution of the United States is in force . . . wherever and whenever the sovereign power of that government is exerted"); *Yick Wo* v. *Hopkins*, 118 U.S. 356, 369; *Downes* v. *Biddell*, 182 U.S. 244, 283; *Russian Volunteer Fleet* v. *United States*, 282 U.S. 481, 489, 491-492; *United States* v. *Pink*, 315 U.S. 203, 228; *Sardino* v. *Federal Reserve Bank*, 361 F.2d 106, 111 (2d Cir. 1966); *United States* v. *Toscanino*, 500 F.2d 267, 280-281 (2nd Cir. 1974).

The court of appeals relied on a line of cases culminating in *Kleindienst* v. *Mandel*, 408 U.S. 753, holding that there is no constitutional limitation upon Congress' plenary power to define the categories of aliens who may be admitted into the United States or who may be permitted to stay here temporarily. But that line of cases does not control here. Petitioners do not claim that the right to asylum arises out of the Constitution. Rather, it is a right created by the political branches by their accession to the Protocol. The court of appeals ignored the warning of this Court in the very case upon which it relied that once a category of admission is created by Congress, as it was here, an alien cannot be denied entry pursuant to that category without being provided procedural due process of law.

> Policies pertaining to the entry of aliens and their right to remain here are peculiarly concerned with the political conduct of government. *In the enforcement of these policies, the Executive Branch of the Government must respect the procedural safeguards of due process.*

Kleindienst v. *Mandel, supra,* 408 U.S. at 766-767 (emphasis added), quoting from *Galvan* v. *Press*, 347 U.S. 522 at 531-532.

Accordingly, the constitutional aspects of the court of appeals decision are dramatically at variance with established doctrine of this Court. Petitioners are entitled to due process of law in the consideration of their asylum applications.

4. We shall not discuss at length at this stage of the case the question of what process petitioners are due under the due process clause.[25] Petitioners submit, however, that upon analysis of "the degree of potential deprivation that may be created by" an

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25. The Court need not even reach the question of the precise procedures which would be required under the Constitution, because the nature of those procedures is established by the Administrative Procedure Act, 5 U.S.C. §551, *et seq.* The Act applies in every case of "adjudication required by statute to be determined on the record after opportunity for an agency hearing." 5 U.S.C. §554. It has been interpreted to apply to all agency determinations in which a hearing is required not only by explicit statutory provision, but also by the Constitution or where a statute should

adverse decision, "the nature of the relevant inquiry," and "the probable value . . . of additional procedural safeguards," *Mathews* v. *Eldridge*, 424 U.S. 319, 341, 343, the Court must conclude that a full evidentiary hearing is required:

> [C]laims for political asylum seem to be of the type properly heard at evidentiary hearings. Such claims may involve factual issues that go beyond those which can be decided fairly from short interviews with recently landed aliens, many of whom are physically exhausted and unfamiliar with the language.

Sannon v. *United States, supra,* 427 F. Supp. at 1275.[26]

"be interpreted as manifesting a Congressional intention so to require." H.R. Report No. 1980, 79th Cong. 2nd Sess., 51 n. 9 (1946). See *Wong Yang Sun* v. *McGrath*, 339 U.S. 33.

Here, some kind of hearing not only is constitutionally required but is inherently necessary to determine whether or not an alien is a *bona fide* refugee. The Protocol must be interpreted "as manifesting a Congressional intention" that a hearing be provided. The nature of the hearing, therefore, is established by the Administrative Procedure Act.

Petitioners are aware that Congress carved out a limited exception to the APA hearing requirements by creating "special administrative proceedings" for deportation and exclusion cases. *Marcello* v. *Bond*, 349 U.S. 302, 310. Indeed, petitioners have argued that asylum determinations *should* be made in those special administrative proceedings. See *ante* at 15-17. If the Court finds, however, that exclusion hearings do not properly encompass asylum determinations, then it must also conclude that Congress created no "special administrative proceeding" for the determination of such questions, and therefore the APA hearing requirements apply.

26. The United Nations High Commissioner on refugees has emphasized the importance of full procedures in the determination of asylum claims:

> Such procedures are of particular importance due to the special problems facing the asylum seeker. The latter is by nature an uprooted person who finds himself in a new environment and may have psychological and language difficulties in putting forward his case.

Report of the High Commissioner, General Assembly, Twenty-Ninth Session, Supplement No. 12 (A/9612) (1974), p. 7. See also *Note on International Protection*, United Nations Document A/AC96/518 (1975); *Report of the High Commissioner*, General Assembly, Thirtieth Session, Supplement No. 12 (A/10002) (1975), p. 4.

At the least, petitioners are entitled to reasonable notice, to a fair opportunity to prepare and present their case, to be apprised of and to have the opportunity to respond to opposing evidence, and to an opportunity to consult with and be represented by counsel or counsel-substitute. And the summary interview procedures followed in this case can meet *no* standard of constitutional due process.

No claim can be made that the administrative burden of an evidentiary hearing would be intolerable. As we have noted, a bill is pending in the House of Representatives which would substantially broaden United States immigration policy with respect to refugees. H.R. No. 3056, 95th Congress, 1st Session. Section 5(e) of that bill would provide that excludable aliens may raise their asylum claims in the course of their exclusion hearings. The Immigration Service and the Justice and State Departments have testified in support of the bill, including section 5(e). Clearly, they have decided that administrative convenience is not and should not be a bar to full and fair asylum hearings.

Indeed, we cannot help but question, as the Court might, why the Justice Department continues to resist the relief petitioners seek in this case. While much of what is contained in H.R. No. 3056 requires congressional action, the relief sought here does not. The Attorney General has ample authority to provide the appropriate relief by regulation, as he has done with respect to deportable aliens seeking asylum pursuant to Article 33. *Cf.*, 8 C.F.R. §242.8. A simple one sentence regulation would provide a fair measure of justice, further Justice Department policy as reflected in its support of section 5(e) of H.R. No. 3056, and eliminate the need for extended litigation such as this case and the *Sannon* case.

Petitioners formally have requested that such a regulation be promulgated, but have received no reply.

CONCLUSION

If, as Justice Frankfurter once observed, "the history of liberty has largely been the history of observance of procedural safeguards," *McNabb* v. *United States*, 318 U.S. 332, 347, then there can be no doubt that the present case is a black mark indeed on that history. Fortunately, our law does not require – or permit – that result.

For the reasons stated, the petition for writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX A

Opinion of the Court of Appeals

Marie PIERRE et al.,
Petitioners-Appellants,

v.

UNITED STATES of America,
Respondent-Appellee.

No. 75–3975.

United States Court of Appeals,
Fifth Circuit.

March 7, 1977.

Appeal from the United States District Court for the Southern District of Florida.

Before AINSWORTH and CLARK, Circuit Judges, and HUGHES,* District Judge.

AINSWORTH, Circuit Judge:

This is an immigration case involving the appeal of a number of Haitian aliens who claim asylum in the United States as political refugees. Petitioners, 147 Haitian nationals who admit their excludability under 8 U.S.C. § 1182(a)(20) (lack of appropriate documentation), requested parole into the United States under section 1182(d)(5) as political refu-

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* Senior District Judge for the Northern District of Texas, sitting by designation.

gees as defined in the United Nations 1967 Protocol and Convention Relating to the Status of Refugees, 19 U.S.T. 6223, T.I.A.S. 6557. The Immigration and Naturalization Service [INS] denied parole and petitioners brought this habeas corpus action in United States District Court. Relief was denied but we remanded the case on motion of petitioners to allow them to provide INS with additional material concerning their status. When none was forthcoming this cause was "returned" to us by the District Court.

On this appeal petitioners assert statutory and constitutional rights which they contend accrue to them by operation of the Protocol; further, they assert a denial of due process by the INS, and argue that INS procedures for considering refugee applications are inadequate and that new procedures should be required. We affirm the District Judge's denial of the habeas corpus petition.

Petitioners were among 216 Haitians who left their country in small groups by boat, during 1972 and early 1973. Upon arriving at United States ports all immediately were taken into the custody of immigration officers without having made "entry."[1] They were then examined by immigration officers in accord-

1. Section 101(a)(13) of the Immigration and Nationality Act of 1952, 8 U.S.C. § 1101(a)(13), provides:

> The term "entry" means any coming of an alien into the United States, from a foreign port or place or from an outlying possession, whether voluntarily or otherwise, except that an alien having a lawful permanent residence in the United States shall not be regarded as making an entry into the United States for the purposes of the immigration laws if the alien proves to the satisfaction of the Attorney General that his departure to a foreign port or place or to an outlying possession was not intended or reasonably to be expected by him or his presence in a foreign port or place or in an outlying possession was not voluntary: *Provided*, That no person whose departure from the United States was occasioned by deportation proceedings, extradition, or other legal process shall be held to be entitled to such exception.

ance with section 235 of the Immigration and Nationality Act, 8 U.S.C. § 1225, which provides in pertinent part:

> All aliens arriving at ports of the United States shall be examined by one or more immigration officers at the discretion of the Attorney General and under such regulations as he may prescribe. . . . Any person coming into the United States may be required to state under oath the purpose or purposes for which he comes, the length of time he intends to remain in the United States permanently and, if an alien, whether he intends to become a citizen thereof, and such other items of information as will aid the immigration officer in determining whether he is a national of the United States or an alien and, if the latter, whether he belongs to any of the excluded classes enumerated in section 1182 of this title.

Examination by immigration officers of these Haitians revealed that each of the petitioners sought to enter the United States without appropriate entry documents. This lack of documents brought them within the terms of 8 U.S.C. § 1182(a)(20), which provides in pertinent part:

> Except as otherwise provided in this chapter, the following classes of aliens shall be ineligible to receive visas and shall be excluded from admission into the United States:
>
> . . . . .
>
> (20) Except as otherwise specifically provided in this chapter, any immigrant who at the time of application for admission is not in possession of a valid unexpired immigrant visa, reentry permit, border crossing identification card, or other valid entry document required by this chapter, and a valid unexpired passport, or other suitable travel document, or document of identity and nationality, if such document is required under the regulations issued by the Attorney General pursuant to section 1181(a) of this title;
>
> . . . .

Despite the plain language of the statute the Attorney General or his delegate can exercise discretion to parole excludable aliens into the United States, 8 U.S.C. § 1182(d)(5).[2] The parole power has

2. 8 U.S.C. § 1182(d)(5) provides:

> The Attorney General may in his discretion parole into the United States temporarily under such conditions as he may prescribe for emergent reasons or for reasons deemed strictly in the public interest any alien applying for admission to the United States, but such parole of such alien shall not be regarded as an admission of the alien and when the purposes of such parole shall, in the opinion of the Attorney General, have been served the alien shall forthwith return or be returned to the custody from which he was paroled and thereafter his case shall continue to be dealt with in the same manner as that of any other applicant for admission to the United States.

been exercised to grant refuge to aliens who would be subject to persecution on account of race, religion or political opinion if excluded and returned to his country of origin. The asylum policy of the United States is reflected in our accession to the Protocol. Article 33 of the Protocol provides:

> No Contracting State shall expel or return ("refouler") a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.

The Protocol adopts as its definition of "refugee" that contained in the United Nations 1951 Convention Relating to the Status of Refugees, as follows:

> A. For the purposes of the present Convention, the term "refugee" shall apply to any person who:
>
> . . . . .

> (2) As a result of events occurring before 1 January 1951 and owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it.

(The Protocol specifically deletes the reference to 1 January 1951.) Department of State Public Notice 351, "Requests for Asylum," 37 F.R. 3447 (Feb. 16, 1972) provides that "A primary consideration in U.S. asylum policy is the 'Protocol Relating to the Status of Refugees,' to which the United States is a party." The Notice also contains the following statement:

> *Policy.* Both within the United States and abroad, foreign nationals who request asylum of the U.S. Government owing to persecution or fear of persecution should be given full opportunity to have their requests considered on their merits. The request of a person for asylum or temporary refuge shall not be arbitrarily or summarily refused by U.S. personnel.

The Haitian petitioners in this case requested asylum in light of this policy, in

the form of "applications for refugee status." The administrative regulations in effect at the time of the applications, found at 8 C.F.R. (1974), provide at section 103.1(f) that the Attorney General's authority under the immigration laws to grant or deny "any application or petition submitted to the Service" is delegated to district directors of the INS.[3] 8 C.F.R. § 212.5(a) further provides that district directors "may" parole aliens into the United States, "after a finding of inadmissibility has been made"[4] under

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3. 8 C.F.R. § 103.1 (1974) provides:

> Delegations of authority.
>
> Without divesting the Commissioner of any of the powers, privileges, and duties delegated to him by the Attorney General under the immigation [sic] and naturalization laws of the United States, coextensive authority is hereby delegated to the following described officers of the Service:
>
> . . . . . .
>
> (f) *District directors.* Under the executive direction of a regional commissioner (except district directors outside the United States . . .), the grant or denial of any application or petition submitted to the Service, the initiation of any authorized proceeding in their respective districts . . . .

4. 8 C.F.R. § 212.5(a) (1974) provides in pertinent part:

> The district director in charge of a port of entry may, prior to examination by an immigration officer, or subsequent to such examination and pending a final determination of admissibility in accordance with sections 235 and 236 of the Act and this chapter, or after a finding of inadmissibility has been made, parole into the United States temporarily in

8 U.S.C. § 1182(d)(5). Thus, district directors are delegated the Attorney General's discretionary power to parole inadmissible aliens into the United States. Pursuant to this provision petitioners made application to the appropriate district director for discretionary parole, asserting that they were political refugees.

The INS has promulgated "Operations Instructions" which include instructions for handling asylum applications. The then current instructions provide:

> 108.1 *Requests for asylum.* (a) *General.* An alien who requests asylum shall be interviewed by an immigration officer and given an opportunity to fully present his case. In every case, detailed facts, including basis for decision and information concerning any subsequent action in the case shall be included in the subject's "A" file.
>
> . . . . .
>
> (c) *Applicants at seaports or airports in the United States.* An alien who requests asylum at time of application for admission at a seaport or airport of entry, before or during an exclusion hearing, or subsequent to such a hearing, shall be interviewed by an immi-

accordance with section 212(d)(5) of the Act any alien applicant for admission at such port of entry under such terms and conditions, including the exaction of a bond on Form I-352, as such officer shall deem appropriate.

> gration officer to determine the basis for his request. . . . In any case in which the District Director does not believe that asylum should be granted and the alien does not withdraw his request, the District Director shall furnish full particulars by letter to the Office of Refugee and Migration Affairs, Department of State. Action to enforce departure shall not be taken in the alien's case until the views of that office have been received and considered by the District Director.

This procedure was followed, as appears in the record, and each of the petitioners was notified by the district director that, in his judgment after consultation with the State Department, they were not subject to political persecution upon return to Haiti. Accordingly, political refugee status and "temporary refuge"—presumably meaning parole—was denied. Each petitioner was then afforded a hearing under 8 U.S.C. § 1226 which provides:

> *Exclusion of aliens—Proceedings*
>
> (a) A special inquiry officer shall conduct proceedings under this section, administer oaths, present and receive evidence, and interrogate, examine, and cross-examine the alien or witnesses. He shall have authority in any case to determine whether an arriving alien who has been detained for further inquiry under section 1225 of this title shall be allowed to enter or shall be excluded and deported. The deter-

mination of such special inquiry officer shall be based only on the evidence produced at the inquiry. No special inquiry officer shall conduct a proceeding in any case under this section in which he shall have participated in investigative functions or in which he shall have participated (except as provided in this subsection) in prosecuting functions. Proceedings before a special inquiry officer under this section shall be conducted in accordance with this section, the applicable provisions of sections 1225 and 1357(b) of this title, and such regulations as the Attorney General shall prescribe, and shall be the sole and exclusive procedure for determining admissibility of a person to the United States under the provisions of this section. At such inquiry, which shall be kept separate and apart from the public, the alien may have one friend or relative present, under such conditions as may be prescribed by the Attorney General. A complete record of the proceedings and of all testimony and evidence produced at such inquiry, shall be kept.

Appeal

(b) From a decision of a special inquiry officer excluding an alien, such alien may take a timely appeal to the Attorney General, and any such alien shall be advised of his right to take such appeal. . . .

Finality of decision of special inquiry officers

(c) Except as provided in subsections (b) or (d) [physical and mental defects] of this section, in every case where an alien is excluded from admission into the United States, under this chapter or any other law or treaty now existing or hereafter made, the decision of a special inquiry officer shall be final unless reversed on appeal to the Attorney General.

Petitioners' cases were each heard by a special inquiry officer, or Immigration Judge. In each case the Haitians were represented by counsel; transcripts of the hearings appear in the record along with transcripts of the Immigration Judges' oral opinions. In each case petitioners were found to have no basis for entry into the United States. The Immigration Judges uniformly noted that they lacked jurisdiction to review the refusal of refugee status and discretionary denial of parole, such discretion having been vested exclusively in the district directors. Under these circumstances each Haitian was found excludable and ordered deported.

The Attorney General has delegated his appellate jurisdiction over exclusion and deportation hearings to a Board of Immigration Appeals, 8 C.F.R. § 3.1(b)(1) (1974).[5] Each of the petitioners appealed his order of exclusion and deportation to

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5. 8 C.F.R. § 3.1 contains the following:

(b) *Appellate jurisdiction.* Appeals shall lie to the Board of Immigration Appeals from the following:

the Board, and each appeal was dismissed, after oral argument by counsel.

Judicial review of final orders of exclusion promulgated pursuant to 8 U.S.C. § 1226 is limited to habeas corpus proceedings, 8 U.S.C. § 1105a(b).[6] Upon dismissal of their causes by the Board 147 Haitians filed consolidated habeas petitions in United States District Court on October 29, 1973. A hearing was held November 21, 1973. Additional Haitians were added later on stipulation that orders would bind all, bringing the total number of petitioner Haitians to 216. On December 28, 1973, the Haitians' petition was denied by the District Judge and notice of appeal to this Court was filed. On October 1, 1974, on the petitioners' motion, the cause was remanded to the District Court. The INS had agreed to reconsider the applications for asylum on the basis of affidavits or other new material, which the petitioners offered to submit to the INS. On January 20, 1975, the District Judge remanded the cause "for further administrative

(1) Decisions of special inquiry officers in exclusion cases, as provided in Part 236 of this chapter.

6. 8 U.S.C. § 1105a(b) provides:

Notwithstanding the provisions of any other law, any alien against whom a final order of exclusion has been made heretofore or hereafter under the provisions of section 1226 of this title or comparable provisions of any prior Act may obtain judicial review of such order by habeas corpus proceedings and not otherwise.

review of the petitioners' claims for political asylum to the Immigration and Naturalization Service." The order concludes, "Until such time as the petitioners' administrative remedies are exhausted, this cause be and the same hereby is DISMISSED." On January 24 the District Judge promulgated a "Clarification of Order of Remand" providing that the orders of expulsion outstanding against the Haitians be stayed "until such time as their Administrative remedies are exhausted and they have had an opportunity to seek review in this Court and in the United States Court of Appeals for the Fifth Circuit." On January 29 the Government filed a motion noting that only 23 of the 216 Haitians had submitted new material to the INS, and requesting that the District Judge amend his order of remand to include only those 23. An exchange of filings followed, and on March 4 the District Judge "expanded" his orders of January 20 and 24 to the effect that

> For purposes of further administrative review, the petitioners' [sic] are to be considered as one class in their pursuit of political asylum in the United States of America, even though all of the petitioners have not supplemented their records made at initial interview with agents of the Immigration and Naturalization Service.
>
> In administrative review of the petitioners' claim for political asylum, the

> Immigration and Naturalization Service should follow existing procedures, if adequate, and new procedures, if necessary, to afford the petitioners an opportunity to be heard (orally or in writing) on their claims for political asylum . . . .

On May 2, 1975, the Government submitted another motion to the District Judge noting that 69 of the Haitians had submitted new materials to INS, that no administrative reconsideration could be taken respecting those not submitting new material, that a stay of deportation order remained in effect regarding the 147 who had not submitted new material pending exhaustion of appeal through the Fifth Circuit but that since they could not be deported they had no motivation to appeal. The Haitians replied through counsel that there were substantial "practical and financial difficulties [in] obtaining new affidavits from every petitioner" and that "the [69] affidavits actually obtained were meant to be *representative* of petitioners as a class." [Emphasis in the original.] A hearing on the Government's motion was held, and on August 7 the District Judge issued an "Order of Severance and Dissolution of Stay." The order noted that 147 Haitians had failed to submit new materials to the INS, and ordered them severed from the group of 216. The order then noted that the INS determinations of excludability of the 147 had already been upheld by this District Court so that "In

the opinion of this Court, further review by this Court would not be required by the Order of Remand issued by the United States Court of Appeals for the Fifth Circuit, for there has been no further action as to the members of said subclass by the Immigration and Naturalization Service." The District Judge ordered the 147 severed and the stay of deportation dissolved as to them. On September 8 the District Judge issued an "Amended Order of Severance and Dissolution of Stay," apparently based upon the same government motion of May 2 and responsive filings on which the August 7 order was based. The District Judge in his September 8 order reiterated the severance of the 147 and his affirmance of the INS determination of excludability. He further ordered the cause of the 147 "returned to the Fifth Circuit Court of Appeals since the purpose of the Order on the Mandate has been fulfilled by this Court." The District Judge reinstated the stay of deportation as to the 147 pending appeal to this Court.

On October 2 the Government filed a motion requesting that the stay be lifted, arguing that "the INS is enjoined from taking any action on an order of deportation which had been affirmed by this Court and the 147 petitioners are under no compulsion to do anything other than enjoy the *status quo*." That same day, October 2, the District Judge issued an "Order Upon Motion for Relief of Order of Judgment" ordering the 147

Haitians to "renew their cause before the Court of Appeals for the Fifth Circuit on or before October 22, 1975." On October 22 the Haitians by their counsel duly filed in this Court an appeal which they characterize as "an appeal from an order of the district court in effect dismissing the action with respect to 147 of the 216 petitioners herein, and directing said 147 petitioners 'to renew their cause before the Court of Appeals for the Fifth Circuit.'"

The effect of the proceedings which we have detailed has been to sever the cause of the 147 petitioners from the rest of the group so that the earlier denial of the habeas corpus petition as to these 147 remains in force.

On appeal petitioners contend that the INS and the District Court misconstrue the effect of the Protocol on the statutory immigration scheme. They argue that on the one hand article 33 of the Protocol permits the INS no discretion to exclude bona fide refugees; and that on the other hand the Protocol vests in all potential refugees a liberty right or expectation protectable under the due process clause of the fifth amendment to the United States Constitution, *cf. Goldberg v. Kelly*, 397 U.S. 254, 90 S.Ct. 1011, 25 L.Ed.2d 287 (1970). Neither contention has merit.

The legislative history of United States accession to the Protocol shows that the State Department, in presenting the Protocol to the Senate for ratification, believed that the Protocol would require no changes in the current administration of immigration policy: Lawrence Dawson, Acting Deputy Director of the Office of Refugee and Migration Affairs of the State Department, testified to this effect before the Senate Foreign Relations Committee when that committee was conducting hearings concerning the Protocol:

> [A]ccession does not in any sense commit the contracting state to enlarge its immigration measures for refugees. Rather, the asylum concept is set forth in the prohibition against the return of a refugee in any manner whatsoever to a country where his life or freedom would be threatened; and the prohibition under Article 32 against the deportation of a refugee lawfully in the territory of a Contracting State to any country except in cases involving national security or public order. The deportation provisions of the Immigration and Nationality Act, with limited exceptions, are consistent with this concept. *The Attorney General will be able to administer such provisions in conformity with the Protocol without amendment of the Act.* [Emphasis added.] [Appendix 90th Cong., 2d Sess., Executive Report No. 14, Protocol Relating to Refugees, September 30, 1968, at 6.]

During those hearings the following exchange took place between Deputy Director Dawson and Senator Sparkman:

> Senator Sparkman: I want to make certain of this: Is it absolutely clear that nothing in this protocol, first, requires the United States to admit new categories or numbers of aliens?
>
> Dawson: That is absolutely clear.
>
> . . . . .
>
> Senator Sparkman: And no requirement of new categories or numbers of aliens?
>
> Dawson; That is correct, sir. [*Id.*]

When the Committee submitted the Protocol to the Senate Senator Mansfield stated, "It is understood that the Protocol would not impinge adversely upon the Federal and State laws of this country." 114 Cong.Rec. 12,021 (Oct. 3, 1968).

The Board of Immigration Appeals thoroughly reviewed the statutory history of the Protocol in Matter of Dunar, B.I.A. Interim Decision No. 2192 (April 17, 1973). The Board concluded that

> the United States Senate, in giving its advice and consent to accession to the Protocol, did not contemplate that radical changes in existing immigration laws would be effected. Quite the contrary, the general representations made to induce affirmative Senate action indicated that our immigration laws already embodied the humane provisions for refugees fostered by the Convention and Protocol. [Matter of Dunar, B.I.A. Interim Decision No. 2192 (April 17, 1973).]

The Courts of Appeals for the Second and Third Circuits have reached similar conclusions. *See Ming v. Marks,* S.D. N.Y., 1973, 367 F.Supp. 673, 677–78, *aff'd,* 2 Cir., 1974, 505 F.2d 1170; *Kan Kam Lin v. Rinaldi,* D.N.J., 1973, 361 F.Supp. 177, *aff'd,* 3 Cir., 1974, 493 F.2d 1229, *cert. denied,* 419 U.S. 874, 95 S.Ct. 136, 42 L.Ed.2d 113 (1974).

[1] We agree with these conclusions and determine accordingly that accession to the Protocol by the United States was neither intended to nor had the effect of substantively altering the statutory immigration scheme. From this determination we draw two conclusions: that no new rights or entitlements were vested in these petitioners by operation of the Protocol, and that the procedures by which the INS determines refugee status were not invalidated.

[2] Petitioners' contention that the Senate's accession to the Protocol vested in aliens a United States constitutional entitlement accompanied by a full array of constitutional protections flies in the face of the legislative history just reviewed. This is just the sort of "radical change" in our immigration laws which the Senate did not intend. The entire immigration scheme would be nullified if any alien desiring entry could demand the full process of the courts to adjudicate his refugee status, merely by appearing at our shores and proffering assertions of status of the nature of those in this case. Therefore, we reject peti-

tioners' contention that the Protocol invests them with a liberty right protectable by due process or other constitutional protections.

[3–5] We also reject petitioners' contention that the INS procedures for determining refugee status are inadequate in light of the terms of article 33 of the Protocol, and that the Protocol creates an "absolute right" against return of a bona fide refugee to a country in which he fears political persecution. Petitioners' assertion fails to consider that asylum results from a two-part determination. First a determination whether the applicant is a bona fide refugee must be made. Under existing statutes the Attorney General then has discretion whether to parole the refugee into the United States. We need not decide whether the Protocol deprives the Attorney General of discretion regarding parole once refugee status is affirmatively determined because petitioners before us failed the first part of the test. The INS, in consultation with the State Department, determined that they were not bona fide refugees. It is clear from the terms of the Protocol itself that an applicant for asylum must fit the definition of bona fide refugee before he can take relief from the terms of the Protocol. Because the Protocol contained no procedures for making this determination, and because Congress saw fit at the time of accession to leave existing procedures unchanged, we conclude that it was the

intent of Congress that existing procedures be followed. These procedures were followed with respect to petitioners' applications for refugee status in this case. This discretionary judgment of a political department is reviewable by us only for abuse of discretion, *Kleindienst v. Mandel*, 408 U.S. 753, 769–70, 92 S.Ct. 2576, 2585, 33 L.Ed.2d 683 (1972). The burden was on petitioners to show the INS that they were refugees, *see Paul v. INS*, 5 Cir., 1975, 521 F.2d 194. To carry this burden an alien must show a "clear probability" of persecution, *Cisternas-Estay v. INS*, 3 Cir., 1976, 531 F.2d 155, 159; *see Gena v. INS*, 5 Cir., 1970, 424 F.2d 227, 229–30.

[6] The present petitioners provided, at best, unsubstantiated and ambiguous claims of conflicts with government authorities in Haiti. The Office of Refugee and Migration Affairs advised the INS that in its judgment these petitioners did not face political persecution on their return to their homes, and that in many cases the Haitian Government appeared to be unaware of them. On this basis petitioners were denied refugee status. Given a second opportunity to submit information or evidence bearing on their status petitioners were unable or unwilling to provide it. On this record we cannot say that a "clear probability" of persecution was shown. Therefore, the INS did not abuse its discretion in refusing refugee status to the petitioners, and the District Judge correctly so found. *See Gena, supra*, 424

F.2d at 232 ["In light of Gena's failure to file new evidence of any kind, we certainly cannot say that the Board's denial of his motion to reopen constituted an abuse of discretion."]; *Daniel v. INS*, 5 Cir., 1976, 528 F.2d 1278, 1279–80 [denial of refugee status to alien who had effected entry, under 8 U.S.C. § 1253(h)]. In short, the Protocol left intact the INS procedure for determining refugee status, and that procedure was followed in this case without abuse of discretion.

[7, 8] Petitioners complain that the distinctions between excludable aliens (those seeking "entry" into the United States) and aliens who have made entry, even if illegally, deny the former class equal protection of the law. The differences are substantial, *see Leng May Ma v. Barber*, 357 U.S. 185, 78 S.Ct. 1072, 2 L.Ed.2d 1246 (1957); *Maldonado-Sandoval v. United States Imm. and Nat. Service*, 9 Cir., 1975, 518 F.2d 278, 280 n. 3. The Supreme Court, however, has pointed out

> that our immigration laws have long made a distinction between those aliens who have come to our shores seeking admission, such as petitioner, and those who are within the United States after an entry, irrespective of its legality.

Leng May Ma v. Barber, supra, 357 U.S. at 187, 78 S.Ct. at 1073. "The distinction was carefully preserved in Title II of the Immigration and Nationality Act," *id.* That Congress has "plenary . . . power to make policies and rules for exclusion of aliens has long been firmly established." *Kleindienst v. Mandel*, 408 U.S. 753, 769, 92 S.Ct. 2576, 2585, 33 L.Ed.2d 683 (1972). "Congress has plenary power in the immigration area, particularly in determining *which aliens will be admitted* and the period they shall remain." *Pelaez v. INS*, 5 Cir., 1975, 513 F.2d 303, 305 [emphasis added]. Congress clearly has the power to draw distinctions between classes of aliens which, if drawn among classes of citizens, would appear to violate the equal protection clause or other constitutional rights. As Judge Moore of the Second Circuit (sitting by designation in the Eastern District of New York) has pointed out, aliens

> may be denied entrance on grounds which would be constitutionally suspect or impermissible in the context of domestic policy, namely, race [*Dunn v. INS*, 499 F.2d 856, 858 (9th Cir. 1974)], physical condition [*United States v. Esperdy*, 2d Cir., 1960, 277 F.2d 537, 539], political beliefs [*Mandel, supra*], sexual proclivities [*Boutilier v. INS*, 387 U.S. 118, 87 S.Ct. 1563, 18 L.Ed.2d 661 (1967)], age [*Nazareno v. Attorney General of the United States*, 1975, 168 U.S.App.D.C. 22, 512 F.2d 936], and national origin [*e. g., Faustino v. INS*, 2d Cir., 1970, 432 F.2d 429, 431].

Fiallo v. Levi, E.D.N.Y., 1975, 406 F.Supp. 162, 165.

In light of the established power of Congress to make such distinctions

among classes of aliens, the question becomes whether Congress or its delegates abuse that power when making a distinction between the class of aliens who have made entry and those who have not. Clearly constitutional protections cannot be afforded to the entire population of the world, and some distinction is necessary. The distinction in question here has been countenanced in a line of Supreme Court cases acknowledging that aliens who have not made entry do not enjoy the protections of the United States Constitution. *See Kleindienst v. Mandel, supra,* 408 U.S. at 762, 769–70, 92 S.Ct. at 2581, 2585; *cf. Mathews v. Diaz,* 426 U.S. 67, 96 S.Ct. 1883, 1891–92, 48 L.Ed.2d 478 (1976). The Supreme Court has recently refused to reconsider this line of cases, *Kleindienst v. Mandel, supra,* 408 U.S. at 767, 92 S.Ct. at 2584. As already noted, Congress has reaffirmed the distinction in the Immigration and Nationality Act. We decline to upset this distinction which lies within the jurisdiction of the political branches of government. *Kleindienst v. Mandel, supra,* 408 U.S. at 765, 92 S.Ct. at 2583.

Petitioners' argument that procedural and other distinctions between aliens who have accomplished entry and those who have not works a denial of equal protection, is without merit.

[9] Finally, petitioners contend that the Administrative Procedure Act, 5 U.S.C. § 500 *et seq.*, is applicable to claims for asylum under article 33 of the

Protocol, because "constitutional due process requires that a hearing be held" to determine refugee status, bringing the determination within 5 U.S.C. § 554 requiring certain protections in every case of "adjudication required by statute to be determined on the record after opportunity for an agency hearing." As we have shown, petitioners are not entitled to constitutional protections. Further, we have concluded that it was the intent of Congress in acceding to the Protocol to leave existing immigration procedure intact, and this procedure did not, at the time pertinent to this case, require a hearing of the sort requested by petitioners to determine refugee status.

Petitioners' remaining contentions will be seen to be without merit in light of the foregoing. Accordingly, the District Judge's order severing the 147 present petitioners from the group of 216 and reinstating his denial of the habeas corpus petition as to the severed 147 was correct.

AFFIRMED.

APPENDIX B

Judgment of the Court of Appeals

UNITED STATES COURT OF APPEALS
For the Fifth Circuit

No. 75-3975

D. C. Docket No. 73-1689-Civ-WM

MARIE PIERRE, *et al.*,
Petitioners-Appellants,

versus

UNITED STATES OF AMERICA,
Respondent-Appellee.

Appeal from the United States District Court for the Southern District of Florida

Before AINSWORTH and CLARK, Circuit Judges, and HUGHES,* District Judge

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Southern District of Florida, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed.

March 7, 1977

Issued as Mandate:

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* Senior District Judge for the Northern District of Texas, sitting by designation.

APPENDIX C

Opinion of the District Court

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF FLORIDA

CASE NO. 73-1689-CIV-WM

IN RE THE MATTER OF:	)	FINDINGS OF FACT
	)	AND
MARIE PIERRE, et al.	)	CONCLUSIONS OF LAW

This cause came before the Court upon the Petition for Writ of Habeas Corpus and the motions for evidentiary hearing and for reduction of bond on behalf of more than two hundred Haitian nationals who are now either in custody or enlarged on bond pending the final disposition of the Orders of Exclusion previously entered in their cause.

Pursuant to an Order to Show Cause why the writ of habeas corpus should not be issued, a hearing on the matter was held before this Court on November 21, 1973. Having heard the arguments of counsel, the testimony of the witnesses, and having reviewed the record in this cause, the Court makes the following findings of fact and conclusions of law.

FINDINGS OF FACT

1. Each of the petitioners is a Haitian national who arrived in the United States on various boats, with the intent of seeking permission to enter the United States based upon a claim of persecution.

2. Upon arrival in the United States, each of the petitioners sought out or waited for the arrival of officials of the Immigration and Naturalization Service.

3. Each of the petitioners was taken into custody by officials of the Immigration and Naturalization Service who conducted interviews with the petitioners to determine their status.

4. Following the arrivals of various groups of Haitians between December 12, 1972, and October 19, 1973, administrative proceedings were conducted to determine their status under congressional and administrative acts relating to immigration and naturalization.

5. None of the petitioners had visas or other entry documents, but each of the petitioners were paroled into the United States pending resolution of the administrative proceedings for review of the question of his right of entry.

6. Those petitioners not in custody in various detention facilities in southern Florida remain enlarged on bond, awaiting execution of various administrative orders issued in their cause.

7. The District Director of the Immigration and Naturalization Service determined that each of the petitioners was an excludable alien, and denied each request for political asylum after consultation with representatives of the Office of Refugee and Migration Affairs of the Department of State.

8. At exclusion hearings scheduled before an Immigration Judge, each petitioner requested the right to present evidence of political persecution, which request was denied due to the lack of jurisdiction of the Immigration Judge to determine such matters in exclusion proceedings.

9. The presiding Immigration Judge ruled that the various petitioners are properly excludable from entry to the United States. Upon appeal of said ruling, the Board of Immigration Appeals reviewed the determination by the Immigration Judge and entered an order of dismissal.

10. Each of the petitioners had administrative remedies for review of the question of his right of entry and having exhausted said remedies, the Orders of Exclusion entered against the petitioners are now final.

CONCLUSIONS OF LAW

The petitioners, well represented by counsel, seek relief from Orders of Exclusion from the United States through peti-

tion for writ of habeas corpus. Most of the arguments in support of the petition, though meritorious, are not cognizable by this Court, for the authority vested in the political branches of the federal government forecloses this Court's jurisdiction to question the fairness of the rules and regulations governing the immigration and naturalization of the various classes of aliens seeking admission to the United States. In the words of Chief Judge John R. Brown,

> The keys to the kingdom are not in the Judges' hands, at least not all of them. Here they are first with the Congress and next with the administrators. *Aalund* v. *Marshall,* 461 F.2d 710, at 714 (5th Cir. 1972).

In determining whether or not the petitioners are entitled to relief, this Court's review of the Orders of Exclusion is limited to whether or not the orders comply with the applicable rules of law so that the petitioners have been afforded procedural due process. Unfortunately, those rules of law are established and administered by the political departments of the federal government, and are largely immune from judicial control. *Shaughnessy* v. *United States,* 345 U.S. 206 (1953); *Aalund* v. *Marshall,* 461 F.2d 710, 711 (5th Cir. 1972), citing *Jarecha* v. *I.N.S.,* 417 F.2d 220, 224 (5th Cir. 1969); *Kam Ng* v. *Pilliod,* 279 F.2d 207, 210 (7th Cir. 1960), *cert. den.,* 365 U.S. 860 (1961).

Counsel for the petitioners contend that the exclusion proceedings followed by the officials of the Immigration and Naturalization Service are invalid, and that deportation proceedings are appropriate here. In order to qualify for deportation proceedings, however, an alien who seeks the additional privileges therein must have made an "entry" into the United States within the meaning of the immigration laws. 8 C.F.R. §235, 236, et seq.

The mere presence of aliens without visas or other entry documents who seek lawful admission to the United States does not constitute an "entry" within the meaning of the immigration laws. *Shaughnessy* v. *United States, ex rel. Mezei,* 345 U.S. 206 (1953); *Leng May Ma* v. *Barber,* 357 U.S. 135 (1958);

United States, ex rel. Knauff v. *Shaughnessy,* 338 U.S. 537 (1949); *Thack* v. *Zurbrick,* 51 F.2d 634 (6th Cir. 1931); *Vitale* v. *I.N.S.,* 463 F.2d 579 (7th Cir. 1972). The petitioners, therefore, do not qualify for deportation proceedings, even though they were allowed into the United States pending a resolution of exclusion proceedings and have remained, in some cases, more than a year.

Counsel for the petitioners also argue that the petitioners were entitled to representation by counsel at the initial interviews conducted by officials of the Immigration and Naturalization Service for the purpose of determining their right to enter into the United States. No such right to counsel has yet been recognized, and this Court declines to do so, it taking an unthinkable stretch of the Constitution to extend the right to counsel to every alien seeking admission to the United States.

Counsel further argue that the petitioners have been denied equal protection in comparison to other groups of aliens who seek refuge under a claim of political persecution. From both a humanitarian and logical standpoint, this Court agrees with counsel's argument, for example, in comparison with the Cuban nationals recently admitted to the United States from Spain. This Court is powerless to adjust such inequities, however, and the petitioners and those similarly situated must rely on Congress and the administrators of the immigration and naturalization laws for appropriate relief.

Having reviewed the administrative proceedings which resulted in the Orders of Exclusion, this Court finds no capricious or arbitrary action on the part of the officials of the Immigration and Naturalization Service that would warrant intervention by the United States District Court. Although the Court is in sympathy with the cause, the petitioners have shown no legal basis for their claim for relief. Accordingly, it is

ORDERED and ADJUDGED the Motion for Evidentiary Hearing be and the same hereby is DENIED. It is further

ORDERED and ADJUDGED that the Motion for Reduction of Bond be and the same hereby is DENIED. It is finally

ORDERED and ADJUDGED that the petition for writ of habeas corpus be and the same hereby is DENIED, and the Order to Show Cause be and the same hereby is discharged.

DONE and ORDERED at Miami, Florida, this 28th day of December, 1973.

s/ W. Mehrtens
UNITED STATES DISTRICT COURT

APPENDIX D

Final Order of the District Court

MARIE PIERRE, et al.,

Petitioners,

vs.

UNITED STATES OF AMERICA,

Respondent.

This cause came before the Court upon the motion of the United States that the August 7, 1975 Order of Severance and Dissolution of Stay be reinstated, or to limit the stay imposed by the Amended Order dated September 8, 1975. The Court having considered the above, and being further advised in the premises, it is

ORDERED and ADJUDGE[illegible]t the sub-class of the one hundred forty seven members o[illegible]lass of Petitioners who have not submitted new material in support of their claims for political asylum to the Immigration and Naturalization Service shall renew their cause before the Court of Appeals for the Fifth Circuit on or before October 22, 1975.

DONE and ORDERED at Miami, Florida this 2nd day of October, 1975.

s/ W. O. Mehrtens
SENIOR UNITED STATES
DISTRICT JUDGE

APPENDIX E

Constitutional, Statutory, and Treaty Provisions Involved

The Fifth Amendment to the United States Constitution provides in relevant part:

> No person . . . shall be deprived of life, liberty, or property, without due process of law.

The United Nations Convention and Protocol Relating to the Status of Refugees, a duly ratified and acceded to treaty of the United States, 19 United States Treaties 6223, provides in relevant part:

Article 1:

> The term "refugee" shall apply to any person who,... owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country, or who, not having a nationality and being outside the country of his former habitual residence, is unable or, owing to such fear, is unwilling to return to it.

Article 33 (1):

> No Contracting State shall expel or return ("refouler") a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.

The Immigration and Nationality Act, 8 U.S.C. § 1101, *et seq.*, provides in relevant part:

Section 235, 8 U.S.C. § 1225:

(a) The inspection, other than the physical and mental examination, of aliens (including alien crewmen) seeking admission or readmission to or the privilege of passing through the United States shall be conducted by immigration officers, except as otherwise provided in regard to special inquiry officers. All aliens arriving at ports of the United States shall be examined by one or more immigration officers at the discretion of the Attorney General and under such regulations as he may prescribe. Immigration officers are authorized and empowered to board and search any vessel, aircraft, railway car, or other conveyance, or vehicle in which they believe aliens are being brought into the United States. The Attorney General and any immigration officer, including special inquiry officers, shall have power to administer oaths and to take and consider evidence of or from any person touching the privilege of any alien or person he believes or suspects to be an alien to enter, reenter, pass through, or reside in the United States or concerning any matter which is material and relevant to the enforcement of this chapter and the administration of the Service, and, where such action may be necessary, to make a written record of such evidence. Any person coming into the United States may be required to state under oath the purpose or purposes for which he comes, the length of time he intends to remain in the United States, whether or not he intends to remain in the United States permanently and, if an alien, whether he intends to become a citizen thereof, and such other items of information as will aid the immigration officer in determining whether he is a national of the United States or an alien and, if the latter, whether he belongs to any of the excluded classes enumerated in section 1182 of this title. The Attorney General and any immigration officer, including special inquiry officers, shall have power to require by subpena the attendance and testimony of witnesses before immigration officers and special inquiry officers and the production of books, papers, and documents relating to the privilege of any person to enter, reenter, reside in, or pass

through the United States or concerning any matter which is material and relevant to the enforcement of this chapter and the administration of the Service, and to that end may invoke the aid of any court of the United States. Any United States district court within the jurisdiction of which investigations or inquiries are being conducted by an immigration officer or special inquiry officer may, in the event of neglect or refusal to respond to a subpena issued under this subsection or refusal to testify before an immigration officer or special inquiry officer, issue an order requiring such persons to appear before an immigration officer or special inquiry officer, produce books, papers, and documents if demanded, and testify, and any failure to obey such order of the court may be punished by the court as a contempt thereof.

(b) Every alien (other than an alien crewman), and except as otherwise provided in subsection (c) of this section and in section 1323(d) of this title, who may not appear to the examining immigration officer at the port of arrival to be clearly and beyond a doubt entitled to land shall be detained for further inquiry to be conducted by a special inquiry officer. The decision of the examining immigration officer, if favorable to the admission of any alien, shall be subject to challenge by any other immigration officer and such challenge shall operate to take the alien, whose privilege to land is so challenged, before a special inquiry officer for further inquiry.

* * *

Section 235, 8 U.S.C. § 1226:

(a) A special inquiry officer shall conduct proceedings under this section, administer oaths, present and receive evidence, and interrogate, examine, and cross-examine the alien or witnesses. He shall have authority in any case to determine whether an arriving alien who has been detained for further inquiry under section 1225 of this title shall be allowed to enter or shall be excluded and de-

ported. The determination of such special inquiry officer shall be based only on the evidence produced at the inquiry. No special inquiry officer shall conduct a proceeding in any case under this section in which he shall have participated in investigative functions or in which he shall have participated (except as provided in this subsection) in prosecuting functions. Proceedings before a special inquiry officer under this section shall be conducted in accordance with this section, the applicable provisions of sections 1225 and 1357(b) of this title, and such regulations as the Attorney General shall prescribe, and shall be the sole and exclusive procedure for determining admissibility of a person to the United States under the provisions of this section. At such inquiry, which shall be kept separate and apart from the public, the alien may have one friend or relative present, under such conditions as may be prescribed by the Attorney General. A complete record of the proceedings and of all testimony and evidence produced at such inquiry, shall be kept.

(b) From a decision of a special inquiry officer excluding an alien, such alien may take a timely appeal to the Attorney General, and any such alien shall be advised of his right to take such appeal. No appeal may be taken from a temporary exclusion under section 1225(c) of this title. From a decision of the special inquiry officer to admit an alien, the immigration officer in charge at the port where the inquiry is held may take a timely appeal to the Attorney General. An appeal by the alien, or such officer in charge, shall operate to stay any final action with respect to any alien whose case is so appealed until the final decision of the Attorney General is made. Except as provided in section 1225(c) of this title such decision shall be rendered solely upon the evidence adduced before the special inquiry officer.

(c) Except as provided in subsections (b) or (d) of this section, in every case where an alien is excluded

from admission into the United States, under this chapter or any other law or treaty now existing or hereafter made, the decision of a special inquiry officer shall be final unless reversed on appeal to the Attorney General.

* * *

APPENDIX F

List of Petitioners

Marie Pierre
Francine Francois
Anelus Seraphin
Joseph George
Brother Norelin
Antoine Jeanty
Alix Matildor
Celania LaBreux
Letand Charles
Aimee Antoine Fils
Emmanuel Rene
Ville Jean Willner
George Bertier
Jacolin Franklin
Phillipe La Moche
Onelia Pierre
Vierge Thomas
Johnny Durand
Antoinette Jean Baptiste
Marie Jean Pierre
Lionel Fombrun
Romely Duval
Claude Charles
Marie Gladys Jean Pois
Innocent Jean Baptiste
Jules Audelin
Rosemarie Nicolas
Elda Limouzin
Jean Lederl
Benisoi Pierre
Esperance Servius
Joseph Michaela
Presendieu Thamas
Elie Jean Baptist
Silvia Jeantillon

Ludovic Lamour
Itemize Lamour
Jeanne Carelus
Marie Lamour
Salem Jidi
Michel Dictan
Fritz Cange
Jean Moliere
Pierre Roger
Yvon Bruno
Pierre Charlemagne
Ceface Saint Jacques
Hermann Chery
Daniel Botex
Myrtil Vilbert
Gerard Joseph
Dijonny Wagner
Itamo Joseph
Jean Claude Thomas
Nelson Thomas
Derisma Janvier
Chaubert Vassor
Danis Mace
Vilner Vanor
Alamanie Olibrus
Tenite Talleyrand
Odasienne Danis
Jeanette Guillaume
Azema Vilbert
Odiside Danis
Edie Pierre
Dieuviewil Matthieu
Marianne Eugene
Hipomen Cadin
Aline Michel

Yanique Bataille
Elmita Dosela
Oltane Joseph
Bernadette Dumont
Charles Josef
Jacqueiine Josef
Marie Teresa Vital
Martha Alix
Brinia Simon
Marlene Richard
Marie Andremise
Remercille Charles
Lorraine Bellefleur
Floraine St. Hubert
Marie Massenoc
Anite Alexis
Irene St. Louis
Janette Thenor
Hermano Luma
Joel Fleuran Cois
Vicrgela Joseph
Chevalier Marcero
Eddy Michaud
Guy St. Louis
Yvon Legros
Jurel Boucigout
Renald Destra
Julet Desir
Oselin Francois
Sauveur Jean-Louis
Telefant Pierre
Yvon Durandisse
Denier Durandisse
Gerard Germain
Daniel Dezire
Joseph Pierre
Gerard Joseph
Fritz Raymond
Maxen Pierre

Georges Pierre
Yva Saint Port
Gisel Saint Fort
Julia Dorcelus
Inocia Raymond
Marguerite Mesidor
Rosie Dorcinvil
Elisman Geoffroy
Jean Louis
Antonio Louis
Wilfred Lick
Vener Lebrun
Emanuel Augustin
Salnave Chery
Sergo Sanon
Hugues Cesar
Alfonse Raymond
Eddie Raymond
Juste Dieulifaite
Yvette Dauville
Fritz Dauville
Denise Alcide
Marie Filogene
Emanuel Guerrier
Jacques Joseph
Oje Omaque
Yves Perrier
Elifete Leon
Marlene Filogene
Lawrence Segus
Claisian Alcime
Michel L. Rene
Renel Nordeluis
Eleus Joseph Bellot
Samuel Loriston
Phillip Johnson
Philippe Filsaime
Bruna Jean-Charles

APPENDIX G

Excerpts from *The Situation in Haiti*, a report by Amnesty International, dated April 20, 1976:

POLITICAL PRISONERS AND AMNESTY INTERNATIONAL ACTION

It is very difficult to assess accurately the present number of political prisoners in Haiti. Different sources have estimated between 400 and 3,000, although the usual estimate is between 300-400. There are 255 names on Amnesty International files. For the overall period of the Duvalier dynasty, the Haitian Federation of Christian Trade Unions, located in Caracas, estimated that there were more than "3,000 people executed and tortured to death." Some exiles make that figure as high as 12 or even 30,000.

The reasons for such vague estimates are inherent in the character of the regime. It is believed that the Government itself is not able to produce an accurate account of prisoners' whereabouts. In any event, prison conditions, disease, brutality, torture and executions inevitably reduce the prison populations drastically. It has been maintained that 10% of arrested Haitians die in the first days after detention and about 80% do not last more than two years. Arbitrary executions, starvation, appalling hygienic conditions, disease and torture – account for what is probably the highest mortality rate amongst prisoners in the world.

Arrests often take the form of disappearances or kidnappings. The families may subsequently be unable to find any trace of their missing relative. In other cases, the police or *Tonton-macoutes* apply the "moulinin operation," which consists of blocking an entire neighbourhood and proceeding to arrest indiscriminately as many as hundreds of citizens. Following severe interrogations, some are released, others are tortured and remain in prison.

It should be pointed out that the term "political prisoners" has to be interpreted in the widest possible sense in the Haitian context. There may have been no political activity whatsoever, as a large number are imprisoned indiscriminately, due to technical mistakes, as a result of personal grudges, or simply for very minor offences. As in most cases there are no judicial procedures whatsoever, and as torture is systematic, these prisoners are well within Amnesty International's area of concern. Only in extraordinary cases are charges brought against prisoners, to be followed by some sort of legal procedure. Certain prominent people may be charged and severely sentenced to dissuade others from following their example. This happened to a group of people rounded up in August 1972 who were accused of subversion and sentenced to life imprisonment by a secret military court.

Amnesty International's documentation reports very few cases of releases and it is feared that the major reason for this is the Haitian Government's fear that information about tragic experiences in Haitian prisons could thus be spread abroad. In some cases released prisoners are warned not to comment on this subject, if they value their lives. On a few occasions the regime has announced with great publicity an amnesty or sentence reductions for political prisoners, but, as illustrated by the so-called 'amnesty' of 132 prisoners in November/December 1973, if prisoners are seen after an "amnesty," it is often because they have been free and in exile for some time anyway.

Confronted with such a situation, AI actions on Haiti have not been able to reach the same level of intensity and efficiency as in other more accessible countries.

HUMAN RIGHTS VIOLATIONS

The Tonton-macoutes were the all-powerful servants of the late Papa Doc and are primarily responsible for the functioning of the repressive machinery in Haiti. With the restoration of Pierre Biamby to a key position of power in the regime, the Tonton-macoutes can expect to enjoy an increase in their influence and sphere of action. This had previously been reduced, due to Baby Doc's reliance on the leopards rather than the ma-

coutes for armed support. The former Private Secretary, Biamby, has always been an organiser and strong supporter of the macoutes.

In December 1975, a courageous denunciation of the Tonton-macoutes was published in *Le Petit Samedi Soir* weekly, in the form of an open letter to the president and signed by 32 citizens of Galette Potonier. While praising the sense of justice and magnanimity shown by the president, the text described some of the atrocities of the Tonton-macoutes:—

"Since their existence, this zone has become a human slaughterhouse. The abuses that have been perpetrated there cannot be enumerated. The people have been despoiled even of their lowly means of subsistence, often beaten to a bloody pulp, without any recourse to and explanation from the militiamen of the area. They do everything arbitrarily; this region was once the breadbasket of Irois and even of surrounding countries. For the past two or three years, it has faced a scarcity of basic foodstuffs and misery has settled in . . .

"Torture was awaiting the thief. The so-called agents of peace inflicted on him a horrible treatment: the poor man was bludgeoned; they enjoyed pummelling his stomach with a cudgel, hitting him in the ribs. Besides wounds here and there, fractures to the spinal column were observed, and the poor man succumbed in excruciating pain on November 4, at 8 pm in public view. All this happened because he had not what it takes to buy his freedom."

By reputation, the worst prison in Haiti is Fort Dimanche, where many of the political prisoners are kept. While other prisoners are given exercise and can receive visits, political prisoners are kept in total isolation. They are not allowed access to lawyers, and indeed no lawyers would dare defend a political prisoner for fear of suffering the same fate. The only way of securing release is if you have an influential friend who will intervene on your behalf. But even this possibility, out of the question for the majority, is denied those who are accused of being 'communist,' when only the Duvaliers themselves or the Chief of Police have the power to release them.

Prisoners are kept in groups of five or six in cells 3 metres by 2. They have no beds or washing facilities. The prisons are infested with insects from the generations of prisoners that have passed through their cells and are never cleaned. The diet consists solely of a kind of maize broth and is never varied by the addition of any meat or vegetables. The prisoners are often so deprived of liquids that they are forced to drink their own urine. Latrines are noticeable only by their absence; a metal can provides a substitute, but is only emptied when it is completely full. Often prisoners may not see the light of day for years.

Maltreatment begins at the moment of arrest. Prisoners are beaten up and often have their skin badly burnt with cigarettes. Other tortures are often of a sophisticated and always of a brutal kind. One example is when the prisoner has his left and right sides attached to two parallel poles, which are then spread apart or turned in opposite directions. It is common practice just before interrogation to attach prisoners by their ankles to the back of a jeep and then drag them at high speed over the ground. During interrogation prisoners are subjected to electric shocks and starved till they can no longer stand. Their torturers then beat them with the cry of "Stand up the dead!"